

BEFORE THE
Federal Communications Commission
WASHINGTON, D.C.

ORIGINAL

ORIGINAL
FILE

In the Matter of)
)
Amendment of Section 2.106 of)
the Commission's Rules to)
Allocate Spectrum to the)
Mobile-Satellite Service Above)
1 GHz for Low-Earth Orbit)
Satellites -- Request for)
Pioneer's Preference by)
Motorola Satellite)
Communications, Inc.)

ET Docket No. 92-28

PP-32

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JUN 12 1992

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)
)
Ellipsat Corp.;)
TRW Inc.;)
Constellation Communications,)
Inc.)

FOIA Control Nos. 92-83,
92-88, 92-86

On Request for Inspection)
of Records)

MOTION FOR STAY

AMSC Subsidiary Corporation ("AMSC"), by its attorneys,
hereby requests that the Commission stay all further action on
the above-referenced request of Motorola Satellite
Communications, Inc. ("MSCI") for a Pioneer's Preference,
including the June 12, 1992 deadline for comments on MSCI's
protected supplemental materials, until there has been a
resolution of the issues raised in AMSC's Application for Review
of the Protective Order issued by the Office of Engineering and

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Technology with respect to the MSCI materials.^{1/} Protective Order, DA 92-674 (May 28, 1992).

AMSC and MSCI are among six applicants that are proposing to use at least a portion of the spectrum currently allocated to the Radiodetermination Satellite Service ("RDSS"). MSCI and all of the other applicants except for AMSC have requested a Pioneer's Preference for their respective proposals. Numerous petitions and responsive pleadings have been filed concerning the technical merit of the RDSS-band proposals. In addition, the parties have filed comments and reply comments on the respective Pioneer's Preference requests. MSCI's proposal clearly is mutually exclusive with that of AMSC and the other applicants, and all of the competing applicants have opposed MSCI's Pioneer's Preference request. MSCI's opponents have noted that MSCI's system lacks the requisite technological innovation to merit a pioneer's preference, and that MSCI has yet to make the requisite demonstration that its complex and expensive proposal is technically workable.

On April 10, 1992, two days after comments on the RDSS band Pioneer's Preference requests were due, MSCI submitted a Supplement to its Pioneer's Preference request. MSCI's filing included a collection of materials for which MSCI requested confidential treatment. MSCI's request was opposed by a number

^{1/} Due to the timing of this Motion and the attached Application for Review, AMSC has telephoned the Office of Engineering and Technology and counsel for the other RDSS band applicants to notify them of the filing of these pleadings today. AMSC also asked, in keeping with the Protective Order, that it not be served with copies of any comments that contain or refer to the protected MSCI materials.

of the competing RDSS applicants, and three of those applicants filed requests under the Freedom of Information Act ("FOIA") for inspection of MSCI's confidential materials.

In a series of actions in response to the MSCI supplemental filing and the FOIA requests, the Office of Engineering and Technology ("OET") found certain of the materials to warrant confidential treatment and issued a Protective Order that permits AMSC and the other RDSS band applicants to review the materials only subject to certain restrictions.

AMSC is this date filing an Application for Review of the Protective Order. In its Application for Review, AMSC demonstrates that the conditional access to the MSCI material provided by the Protective Order effectively denies AMSC access to that material. Given the similarity between what may be in the protected MSCI materials and the satellite communications research and development being conducted by AMSC, any examination of the MSCI material by AMSC would present a substantial risk that AMSC would be subject to a trade secret misappropriation action by MSCI, against which AMSC as a practical matter would have great difficulty defending. Furthermore, AMSC shows in its Application for Review that the OET decision contains no record basis for conditioning access to the MSCI materials, and that the materials either should be made unconditionally accessible or excluded from consideration in the Pioneer's Preference proceeding.

The Commission has established June 12, 1992 as the deadline for filing comments on the supplemental MSCI material, including

the material subject to the Protective Order.^{2/} Given the fact that AMSC is effectively being denied access to the confidential material, however, any examination of the protected material or consideration of filings based on the material would do irreparable harm to AMSC, the Commission, and the public.

The following well-established factors are to be considered in ruling on a motion for stay:

- (i) the likelihood that the party seeking the stay will prevail on the merits;
- (ii) the likelihood that the moving party will be irreparably harmed absent a stay;
- (iii) the prospect that others will be harmed if the agency grants the stay; and
- (iv) the public interest in granting the stay.

Cuomo v. U.S. Nuclear Regulatory Commission, 772 F.2d 972, 974 (D.C. Cir. 1985) (citing Washington Metropolitan Area Transit Authority v. Holiday Tours, Inc., 559 F.2d 841, 843 (D.C. Cir. 1977)).

Likelihood of Success on the Merits

AMSC is likely to prevail on the merits of its Application for Review. In the attached pleading, incorporated herein by reference, AMSC demonstrates in detail that it is being denied access to the MSCSI materials without a record basis and that the Commission should not rely on the protected materials in making a decision in the Pioneer's Preference proceeding.

^{2/} Public Notice, Mimeo No. 23328 (May 29, 1992); see also Protective Order, Para. 4.

Irreparable Harm to AMSC

The harm to AMSC absent a stay is manifest. As noted above and in its Application for Review, AMSC is effectively precluded from reviewing the protected materials. As a participant in the Pioneer's Preference proceeding, AMSC has sought the denial of MSCI's Pioneer's Preference request and has questioned the innovativeness and feasibility of MSCI's technology. AMSC would be harmed significantly in its efforts to comment effectively on the merits of MSCI's Pioneer's Preference request if the Commission considers the MSCI material, which relates to MSCI's system technology, without AMSC having an opportunity to submit its own evaluation of the material.

Lack of Harm to Other Parties

Grant of this motion will not harm any interested parties to this proceeding. Postponement of consideration of the protected MSCI materials will benefit all parties by allowing the Commission to consider MSCI's Pioneer's Preference fully and fairly, without the prospect of eventual recusal by Commission staff in the event the Protective Order is vacated and MSCI subsequently requests the protected materials be returned.^{3/} A stay also would facilitate the possibility that all parties eventually could review and analyze the MSCI material without fear of later being subject to a trade secret misappropriation suit by MSCI.

^{3/} See Letter from David R. Siddall to Robert L. Mazer (May 4, 1992), at 2.

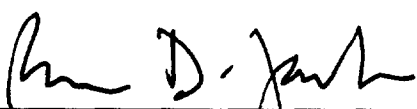
Public Interest in Granting the Stay

Finally, the public interest in open agency decisionmaking will be served by the requested stay. Postponement of any further examination of the confidential MSCI material and filings based thereon will ensure that the determination of whether MSCI deserves a Pioneer's Preference -- a virtually guaranteed license grant -- is not based on information for which access was severely restricted. It also will discourage other applicants who similarly would seek to have the Commission decide their Pioneer's Preference claims on the basis of non-public information.^{4/}

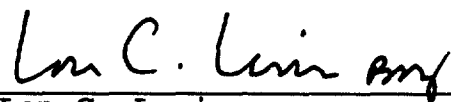
For these reasons, AMSC urges the Commission to refrain from further examining or considering the MSCI material and to stay the June 12, 1992 date for comments on the supplemental MSCI material pending a final decision on AMSC's application for review.

Respectfully submitted,

AMSC SUBSIDIARY CORPORATION



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Dated: June 12, 1992

^{4/} See Letter from Jill Abeshouse Stern to Donna R. Searcy (June 5, 1992) (submitting supplemental "confidential" information in support of Ellipsat's Pioneer's Preference request). This request was denied by OET. See Letter from David R. Siddall to Jill Abeshouse Stern (June 10, 1992).

CERTIFICATE OF SERVICE

I, Jacqueline L. Mateo, a secretary in the law firm of Fisher, Wayland, Cooper and Leader, hereby certify that true copies of the foregoing "Motion for Stay" were sent this 12th day of June 1992, by first class United States mail, postage prepaid, to the following:

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